87-1720

Supreme Court, U.S.
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CLERK

No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1987

HUBERT C. TAYLOR,
Petitioner
vs.
PEABODY COAL COMPANY,
OLD REPUBLIC INSURANCE COMPANY, and
DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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April 15, 1988

QUESTION PRESENTED

Whether the court of appeals erred in failing to construe the requirement of Section 402 (f)(2) of the Black Lung Benefits Act, 30 U.S.C. 902§(f)(2), that the "criteria" applied to certain claims adjudicated by the Secretary of Labor "not be more restrictive" than criteria set forth in rules applied by the Secretary of Health, Education, and Welfare (HEW) to claims filed during an earlier period, and in thereby ruling that the Department of Labor must only apply medical criteria no more restrictive than those applied by HEW, but must not also apply the evidentiary rules and adjudicatory standards applied by HEW.

PARTIES TO THE PROCEEDINGS

This suit was brought by Hubert C. Taylor. Named as Defendants are Peabody Coal Company and the Director, Office of Workers' Compensation Programs.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. _____

HUBERT C. TAYLOR,
Petitioner

vs.

PEABODY COAL COMPANY,
and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on January 25, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 838 F. 2d 227 and is printed in App. 1a. The decisions of the Benefits Review Board, App. 6a, and the Administrative Law Judge, App. 11a, are unreported.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit (App. 1a) was entered on January 25, 1988. The jurisdiction of this Court is invoked under 28 U.S.C.§1254 (1).

STATUTOPY PROVISION INVOLVED

Section 402(f) of the Black Lung Benefits Act, 30 U.S.C. §902(f), provides, in pertinent part:

> (1) The term "total disability" has the meaning given it by regulations of the Secretary of Health and Human Services for claims under Part B of this subchapter, and by regulations of the Secretary of Labor for claims under part C of this subchapter, subject to the relevant provisions of subsections (b) and (d) of section 923 of this title, except that —
>
> * * * * *
>
> (2) Criteria applied by the Secretary of Labor in the case of —
>
> (A) any claim which is subject to review by the Secretary of Health and Human Services, or subject to a determination by the Secretary of Labor, under section 945(a) of this title;
>
> (B) any claim which is subject to review by the Secretary of Labor under section 945(b) of this title; and
>
> (C) any claim filed on or before the effective date of regulations promulgated under this subsection by the Secretary of labor;
>
> shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final

disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.

STATEMENT

1. *Statutory and regulatory framework.* The Black Lung Benefits Act, 30 U.S.C. (& Supp. III)§901 *et seq.*, provides benefits to coal miners (and eligible survivors) who suffer from pneumoconiosis [1] that arose out of coal mine employment, causing total disability or death, 30 U.S.C.§901(a), 932(c). Claims for benefits are adjudicated under two programs, depending on the date the claim was filed. Claims filed before July 1, 1973, under "Part B" of the Act, were considered by the Department of Health, Education, and Welfare (HEW), and benefits were paid by the federal government, 30 U.S.C.§922(a), 924. Claims filed after that date, and adjudicated under "Part C" of the Act, are considered by the Department of Labor. 30 U.S.C. (& Supp. III)§925, 932. Individual coal mine operators bear primary responsibility for paying Part C benefits (30 U.S.C.§932(b), although in certain cases Part C benefits are paid from the Black Lung Disability Trust Fund, which is financed by the coal mining industry and administered by the Director of the Office of Workers' Compensation Programs. *See* 30 U.S.C.§932(j), 934; 26 U.S.C.§412(a), 9501

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[1] The Statute (30 U.S.C.§902(b)) and the regulations (20 C.F.R.§727.202) include in the definition of "pneumoconiosis" not only the description of the disease but also a requirement that it be caused by coal mine employment.

a. Prior to the 1977 amendments, the Black Lung Benefits Act authorized HEW to establish the regulatory standards for determining when a coal miner's pneumoconiosis would be deemed to be totally disabling. *See* 30 U.S.C. (1976 ed.)§902(f). In 1972, HEW promulgated two sets of regulations. It promulgated permanent regulations that set certain medical standards for determining when a miner's respiratory impairment is considered totally disabling. Under HEW's permanent regulations, to establish total disability a miner had to show through ventilatory studies that the volume of air his lungs could expel was less than certain values (20 C.F.R.§410.426(b)), or show an impairment of the blood's ability to carry oxygen or certain heart abnormalities (20 C.F.R.§410.424 & Subpart D App.).

In 1972, HEW also promulgated a special, interim regulation applicable to Part B claims, *ie.*, those filed by miners on or before June 30, 1973, or by survivors of miners who died before January 1, 1974. The interim regulation was HEW's response to congressional concern about an existing backlog of claims and the unavailability of medical testing facilities to evaluate disability due to pneumoconiosis. 20 C.F.R.§410.490(a). HEW's interim regulation provided an "interim presumption" of total disability for Part B claimants who showed a respiratory impairment, measured by ventilatory studies, that is less severe than is required under HEW's permanent regulations. *Cf.* 20 C.F.R.§410.490(b)(1)(ii) with §410.426(b). §410.412(a)(1) defines "total disability" as pneumoconiosis that prevents the miner from engaging in gainful work in the immediate area of his residence requiring the skills and abilities comparable to those of any work in a mine in which he previously engaged and over a substantial period of time. This rebuttable presumption was only available to miners who had worked at least ten years in coal mines. 20 C.F.R.§410.490(b)(1)(ii) and (b)(3).

HEW's interim regulation also provided a rebuttable presumption that a claimant was totally disabled if x-ray, biopsy or autopsy evidence established the existence of pneumoconiosis and the impairment was caused by coal mine employment. 20 C.F.R.§410.490(b)(1)(i) and (b)(2). Causation would be proved under the regulation in two ways. First, if a miner worked for ten years in a coal mine his pneumoconiosis was presumed to arise from his coal mine employment. Second, in any other case the claimant "must submit the evidence necessary to establish that the pneumoconiosis arose out of employment in the Nation's coal mines." 20 C.F.R.§410.416, 410.456. As a result, a miner who worked for less than ten years in a coal mine could establish a presumption of total disability under HEW's interim regulation by showing the existence of pneumoconiosis by means of an x-ray and presenting evidence supporting the claim that coal mine work caused the pneumoconiosis.[2]

b. Congress amended the Act in 1977, giving the Secretary of Labor the authority to issue regulations defining "total disability" and to "establish criteria for appropriate medical tests * * * which accurately reflect total disability in coal miners * * *." Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239,§2(c), 92 Stat. 96; 30 U.S.C.§902(f)(1)(D). Congress also directed the Secretary to reopen claims that had been denied prior to the effective date of the 1977 amendments. 30 U.S.C.§945. Congress provided in Section 402(f)(2) that, in adjudicating the total disability of those claimants, along with any other

[2] HEW's interim presumption of total disability could be rebutted by "evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work" or by other evidence, "including physical performance tests * * * establish(ing) that the individual is able to do his usual coal mine work or comparable and gainful work", with reference to HEW's definition of total disability, §410.412(a)(1). 20 C.F.R.§410.490(c).

claimants who filed claims before the Secretary's final regulations were promulgated,[3] the "(c)riteria applied by the Secretary of Labor * * * *shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973," ie.* to a claim adjudicated under HEW's interim Part B regulations. 30 U.S.C.§902(f)(2) (emphasis added).

The Secretary promulgated an interim regulation in 1978 (20 C.F.R§727.203) that provides a presumption of total disability that is similar but not identical to HEW's interim regulation. Those regulations allow miner's four separate methods of invoking the interim presumption (20 C.F.R.§727.203 *ie.* by chest x-ray, biopsy or autopsy; ventilatory studies; arterial blood gas tests; or, by reasoned medical opinions of physicians. However, the Secretary's interim regulation allows rebuttal four different ways, *ie.* that the miner is doing his usual coal mine work or comparable and gainful work; that the miner is able to do his usual coal mine work or comparable and gainful work; that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or, that the miner does not, or did not, have pneumoconiosis. Under the HEW's interim regulation, (20 C.F.R.§410.490(c), rebuttal of the presumption may be established only two ways: *ie.* that the evidence establishes the claimant is doing his usual coal mine work or comparable and gainful work, or that the claimant is able to do his usual coal mine work or comparable and gainful work, with reference made to "total disability", defined under §410.412(a)(1).

---

[3] Final regulations (20 C.F.R.§718) were proposed in 1978 and became effective on April 1, 1980.

2. *Factual background.* Hubert C. Taylor filed a claim for federal black lung benefits June 6, 1977 pursuant to the Black Lung Benefits Act, 30 U.S.C. §901 *et seq.* Taylor was ineligible for the HEW regulation at section 410.490 because his claim was not filed on or before June 30, 1973 and, accordingly, his claim was not a Part B filing. Taylor's claim was pending as of the effective date of the 1977 Amendments, *ie.* March 1, 1978, and thus this claim falls under the unique provisions of 30 U.S.C.§945 whereby his claim was reviewed under the regulations promulgated by the Secretary of Labor pursuant to the 1977 Amendments.

His claim was initially approved by the Deputy Commissioner under section 727.203, the Part C regulations promulgated by the Secretary of Labor. The Deputy Commissioner identified Peabody Coal Company as the putative responsible operator and, contesting Taylor's claim, Peabody filed its Notice of Controversion on April 8, 1980. A formal hearing was requested by Peabody and the formal hearing was held on December 4, 1984, in Evansville, Indiana before Administrative Law Judge Robert L. Hillyard. Judge Hillyard issued his Decision and Order - Awarding Benefits on August 29, 1985 finding, in pertinent part, that the interim presumption (20 C.F.R.§727) was rebutted under §727.203(b). In addition, he found that Taylor's claim was governed by HEW's interim presumption, 20 C.F.R.§410.490, and the evidence was sufficient to invoke that presumption. Further, he found rebuttal had not been accomplished since there was no evidence the miner was not vocationally disabled according to *Haywood v. Secretary of Health and Human Services*, 699 F. 2d 277 (6th Cir. 1983). (App. 11a).

Peabody appealed to the Benefits Review Board and the Board reversed on the basis Taylor's claim is not governed by §410.490. (App. 6a).

Taylor appealed and the Court of Appeals for the Seventh Circuit affirmed the reversal of the Benefits Review Board, finding that the issue presented in Taylor's case is identical to the issue decided in *Strike v. Director, Office of Workers' Compensation Programs*, 817 F. 2d 395 (7th Cir. 1987). In *Strike*, the Seventh Circuit reviewed the legislative history of the term "criteria," and held that the statute and relevent legislative history do make clear that in enacting §902(f)(2), "Congress only intended to prohibit the Secretary of Labor from applying more restrictive medical criteria" in reviewing previously denied and pending claims pursuant to §945. *Strike v. Director, Office of Workers' Compensation Programs*, 817 F. 2d at 404. (App. 1a).

3. *The merits issue.* Five circuits have considered whether the Secretary's interim regulation conflicts with Congress's directive in §902(f)(2) that reopened claims and claims filed before the Secretary's permanent regulations became effective be considered under "(c)riteria * * * (that) shall not be more restrictive than the criteria applicable to a claim" considered under HEW's regulation governing Part B claims. The first court to do so was the Third Circuit. It concluded, in *Halon v. Director, Office of Workers' Compensation Programs*, 713 F. 2d 21 (1983) that the Secretary's interim regulation contained more restrictive "criteria" than HEW's interim regulation, contrary to §902(f)(2), because the Secretary's interim presumption could not be established by a miner who worked in coal mines for less than ten years. Judge Weis dissented in *Halon*. He agreed with the Department that the "criteria" refered to in §902(f)(2) were medical criteria and that Congress did not intend to require the Secretary to apply the same evidentiary rules and adjudicatory standards applicable under HEW's Part B regulation.

The Eighth Circuit followed *Halon* in *Coughlan v. Director, Office of Workers' Compensation Programs*, 757 F. 2d 966 (1985) and *In re Sebben*, 815 F. 2d 475 (1987) (cert. granted February 22, 1988) (Nos. 87-821 and 87-827).

The Seventh Circuit upheld the Secretary's interim regulation in *Strike v. Director, Office of Workers' Compensation Programs*, 817 F. 2d 395 (1987), relying on Judge Weis's arguments.

The Sixth Circuit in *Kyle v. Director, Office of Workers' Compensation Programs*, 819 F. 2d 139 (1987) (petition for cert. filed) (No. 87-1045), and the Fourth Circuit in *Broyles v. Director, Office of Workers' Compensation*, 824 F. 2d 327 (1987) (petition for cert. filed) (No. 87-1095), agreed with the Third and Eighth Circuits.

REASONS FOR GRANTING THE PETITION

The primary issue in this case is whether 20 C.F.R.§410.490 can be applied to a Part C claim. The decisions of the Court of Appeals for the Seventh Circuit in the instant case and in *Strike v. Director, Office of Workers' Compensation Programs*, 817 F. 2d 395 (1987) are in conflict with decisions reached on the identical issue in *Broyles v. Director, Office of Workers' Compensation Programs*, 824 F. 2d 327 (4th Cir. 1987) (petition for cert. filed) (No. 87-1095); *Halon v. Director, Office of Workers' Compensation Programs*, 713 F. 2d 21 (3rd Cir. 1982); *Coughlan v. Director, Office of Workers' Compensation Programs*, 757 F. 2d 966 (8th Cir. 1985); *In re Sebben*, 815 F. 2d 475 (8th Cir. 1987) (cert. granted February 22, 1988) (Nos. 87-821 and 87-827); *Kyle v. Director, Office of Workers' Compensation Programs*, (6th Cir. 1987) (petition for cert. filed).

As this court has recently granted certiorari in *In re Sebben*, (cert. granted February 22, 1988) (Nos. 87-821 and 87-827), Petitioner suggests that this Court hold this petition and dispose of it in light of the Court's disposition of *In re Sebben*.

CONCLUSION

The petition for writ of certiorari should be held and disposed of as appropriate in light of *In re Sebben*.

Respectfully submitted,

S/ Jack N. VanStone

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APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 86-2590
HUBERT C. TAYLOR,

Petitioner,

v.

PEABODY COAL COMPANY and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION,

Respondent.

On petition for review of an order of the
Benefits Review Board,
United States Department of Labor.

ARGUED OCTOBER 28, 1987
DECIDED JANUARAY 25, 1988

Before EASTERBROOK, RIPPLE, and KANNE, *Circuit Judges.*

KANNE, *Circuit Judge.* Petitioner is Hubert C. Taylor, ("Taylor"), a retired miner. Respondent is Peabody Coal Co., ("Peabody"), his former employer. This appeal concerns Taylor's 1978 claim for benefits under the Black Lung Benefits Act, 30 U.S.C.§901-945. We have jurisdiction pursuant to §21(C) of the Longshoreman's and Harbor Workers' Compensation Act, as amended, 33 U.S.C.§921(c), as incorporated by §422(a) of the Black Lung Benefits Act, 30 U.S.C.§932(a). Congress divided black lung benefits claims into two separately administered programs, one formerly regulated by the Secretary of Health, Education and Welfare under 20 C.F.R.§410.490 (Part B) and another regulated by the

Secretary of Labor under 20 C.F.R.§727.203 (Part C). Claims filed before December 31, 1973 are resolved under Part B's provisions and those filed after that date are administered under Part C's provisions. We agree with the analysis of the Benefits Review Board, which found that because Taylor's claim was filed after the December 31, 1973 cutoff date, it must be resolved under the Part C provisions found at 20 C.F.R.§727.203. We therefore deny Taylor's petition for review.

The Office of Workers' Compensation Programs approved (sic) Herbert Taylor's application for benefits on March 31, 1981. Peabody filed a Notice of Controversion on April 8, 1980 and requested a formal hearing.

The Administrative Law Judge ("ALJ") held a hearing on December 4, 1984. Because Taylor's claim was filed after the deadline for Part B claims, the ALJ initially applied Part C regulations promulgated by the Secretary of Labor. The ALJ found that Taylor met his initial burden under 20 C.F.R.§727.203 by establishing a rebuttable presumption that he was entitled to benefits. The ALJ concluded, however, that Peabody successfully rebutted the interim presumption pursuant to 20 C.F.R.§727.203(b)(2) by presenting medical evidence that Taylor had only a mild pulmonary impairment which did not prohibit him from performing his work.

Taylor argued that Congress intended to liberalize eligibility for black lung benefits. The ALJ next examined Taylor's claim under the Part B regulations. He found that Taylor was entitled to benefits and that Peabody failed to rebut the presumption that Taylor should receive black lung benefits.

Peabody then appealed the ALJ's decision to the Benefits Review Board ("Board"). The Board reversed the ALJ's application of Part B regulations and held that claims for black lung benefits filed after December 31, 1973 must be resolved through an exclusive application of Part C regulations.

Petitioner argues that in amending the Black Lung Benefits Act, Congress intended to liberalize the eligibility requirements. Title 30 U.S.C.§902(f)(2)(c) mandates that "(r)egulations promulgated under this subsection by the Secretary of Labor; *shall not be more restrictive* than the criteria applicable to a claim filed on June 30, 1973 . . . (Part B)." Taylor interprets the "not more restrictive" language of the statute as a direction to consider his claim under the more "liberal" criteria of Part B. Petitioner contends that this interpretation is more consistent with the policy of liberalization underlying the amended Black Lung Benefits Act. In his initial brief, petitioner cites *Halon v. Office of Workers' Compensation Programs*, 713 F. 2d 21 (3rd Cir. 1982) in which a claim for black lung benefits was filed after the 1973 deadline and disposed of by the Department of Labor. In *Halon*, the Third Circuit interpreted the "not more restrictive" language of 30 U.S.C.§902(f)(2) as entitling the claimant to the benefit of disposition under Part B.

The *Halon* court wrote:

> We agree . . . that if the Board is to effectuate the intent of Congress in enacting the 1977 Amendments to the Black Lung Benefits Act, of which 30 U.S.C.§902(f)(2) is a part, it must apply the presumption in C.F.R.§410.490(b) whenever the claimant establishes pneumoconiosis by x-ray, biopsy or autopsy, and also establishes that the pneumoconiosis arose out of coal mine employment.

Halon, 713 F. 2d at 31. Other circuits are in accord. *Coughlan v. Director, OWCP*, 757 F. 2d 966, 968 (8th Cir. 1985); *Kyle v. Director, OWCP*, 819 F. 2d 139, 143 (6th Cir. 1987); *Broyles v. Director, OWCP*, 824 F. 2d 327 (4th Cir. 1987); *Whitfield v. Sebben*, 815 F. 2d 475 (8th Cir. 1987) *(Petition for cert. filed)*.

However, we do not agree with this interpretation. In *Strike v. Director*, 817 F. 2d 395 (7th Cir. 1987), as in the case at bar, the claimant sought consideration under the Part B regulations of 20 C.F.R.§410.490 because the criteria for the Part C regulations under 20 C.F.R.§727.203 were "more restrictive."

We reviewed the legislative history of the term "criteria," and held that:

> (W)e are nonetheless convinced that the statute and the relevant legislative history do make clear that in enacting §902(f)(2), *Congress only intended to prohibit the Secretary of Labor from applying more restrictive medical criteria* in reviewing previously denied and pending claims pursuant to §945.

Strike, 817 F. 2d at 404. (Emphasis added.)

Thus, this circuit has rejected the argument that Congress intended §410.490 to be applied to Part C claims when it "liberalized" the Black Lung Benefits Act.

Petitioner, in his initial brief, said the case is like *Halon*. In his reply brief (after *Strike*) he distinguishes this case from *Halon*. Petitioner cannot have it both ways. It is well settled that issues appearing for the first time in a reply brief will not be considered by this court. *See* Rule 9(c) of

the Rules of the United States Court of Appeals for the Seventh Circuit; *Matter of Bear*, 789 F. 2d 577, 579 (7th Cir. 1986); *Christmas v. Sanders*, 759 F. 2d 1284, 1292 (7th Cir. 1985); *Beerly v. Department of Treasury*, 768 F. 2d 942, 949 (7th Cir. 1985).

Because we adhere to our holding in *Strike* that "(t)he Part B and Part C programs were intended to be separate and distinct," *Id.* p. 405, we find that the Board correctly resolved Taylor's claim by exclusively applying the Part C regulations. Taylor did not establish eligibility for black lung benefits under Part C, and the ALJ cannot refer to the procedural provisions of Part B. Thus, Taylor's petition seeking review of the Board's decision is DENIED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

U.S. Department of Labor

BENEFITS REVIEW BOARD

BRB No. 85-2177 BLA
OWCP No. 310-10-4934

HUBERT C. TAYLOR, Claimant-Respondent
v.
PEABODY COAL COMPANY, Employer-Petitioner

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Party-in-Interest

NOT-PUBLISHED

July 29, 1986

DECISION and ORDER

Appeal of the Decision and Order of Robert L. Hillyard, Administrative Law Judge, United State Department of Labor.

Jack N. VanStone (VanStone and Krochta), Evansville, Indiana, for claimant.

David J. Mallon, Jr. (Ice, Miller, Donadio and Ryan), Indianapolis, Indiana, for employer.

Michael J. Denny (Donald S. Shire, Associate Solicitor of Labor; Rae Ellen Frank James, Counsel for Benefit Programs), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BROWN AND DOLDER, Administrative Appeals Judges, and CLARKE, Administrative Law Judge.*

PER CIRIAM:

* Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C.A. §921(b)(5) (West 1986).

Employer appeals the Decision and Order (82-BLA-3822) of Administrative Law Judge Robert L. Hillyard awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C.§901 *et seq.* The administrative law judge found the evidence sufficient to invoke the interim

presumption under 20 C.F.R. §727.203(a)(1) and to establish rebuttal under 20 C.F.R. §727.203(b)(2). The administrative law judge concluded that the Section 727.203(b)(2) rebuttal finding precluded a finding of entitlement under the permanent criteria of 20 C.F.R. Part 410, Subpart D upon application of the interim criteria of Part 410 to the facts of this case, however, the administrative law judge determined that claimant had established invocation of the Section 410.490 presumption. See *Halon v. Director, OWCP*, 713 F. 2d 30, 5 BLR 2-20 (3rd Cir. 1982), *aff'd on rehearing*, 713 F. 2d 21 (1983); 20 C.F.R. §410.490(b). Notwithstanding his finding of rebuttal pursuant to Section 727.203(b)(2), the administrative law judge found that rebuttal of the Section 410.490 presumption had not been established under *Haywood v. Secretary of Health and Human Services*, 699 F. 2d 277, 5 BLR 2-30 (6th Cir. 1983). *See* 20 C.F.R. §410.490(c). Employer assigns error to the administrative law judge's application of the provisions of Section 410.490 against an employer and carrier in a case arising in the Seventh Circuit, Employer's brief at 4-5, 6-9, Employer's reply brief at 1-3, and to the administrative law judge's application of the vocational disability rule set forth in *Haywood, supra* to this Part C claim. Employer's brief at 3-4; *see Ramey v. Kentland Elkhorn Coal Corp.*, 755 F. 2d 485, 490 (6th Cir. 1985). Employer additionally contends that the administrative law judge's assessment of interest against employer commencing with the putative month of entitlement, *ie.*, June 1977, constitutes error. Employer's brief at 5-6.

The Board's scope of review is governed by statute. If the administrative law judge's findings of fact are supported by substantial evidence, are rational, and are in accordance with law, they are binding upon the

Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. 932(a); *O'Keeffee v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer's challenge to the administrative law judge's award of benefits on the basis of *Halon, supra*, 713 F. 2d 30, 5 BLR 2-20(3d (sic) Cir. 1982), *Coughlan v. Director, OWCP*, 757 F. 2d 966, 7 BLR 2-177 (8th Cir. 1985), and the presumption found at Section 410.490, is dispositive of this appeal. The Board has held that the *Halon* holding will be followed only in the Third Circuit and other circuits having adopted *Halon, viz*, the Eighth Circuit. *See Stanton v. Director, OWCP*, 8 BLR 1-438 (1986); *Hunley v. Director, OWCP*, 8 BLR 1-323 (1985); *Thornton v. Director, OWCP*, 8 BLR 1-277 (1985); *Marsiglio v. Director, OWCP*, 8 BLR 1-190 (1985). The instant case arises in the Seventh Circuit. ([1]) *See Hon v. Director, OWCP*, 699 F. 2d 441, 444 (8th Cir. 1983); *Tobin v. Director, OWCP*, 8 BLR 1-115, 1-118 n. 2 (1985). We therefore reverse the administrative law judge's award of benefits since it was predicated

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[1] The administrative law judge erroneously assumed that this case is governed by the law of the United States Court of Appeals for the Sixth Circuit. *See* Decision and Order at 11 n. 3. Although neither the hearing transcript nor the documentary evidence of record clearly identifies the state in which claimant's coal mine employment occurred, the record indicates that the hearing was convened in claimant's home state of Indiana, counsel for claimant and employer practice in Indiana, claimant was married in Indiana (Director's Exhibit 4), and claimant obtained medical treatment in Indiana. Consequently, we hold, as urged by employer and the Director (*See* Employer's brief at 4; Director's brief at 3) that the present case arises in the Seventh Circuit.

on the erroneous application of *Halon, supra*, and the Section 410.490 presumption. Because we reverse the award, we need not reach employer's arguments concerning the invalidity of Section 410.490 as applied to an employer and carrier, the inapplicability of the *Haywood* vocational disability rule, or the assessment of interest. Finally, we affirm the administrative law judge's finding of rebuttal under Section 727.203(b)(2) since this determination was not challenged on appeal.

Accordingly, the Decision and Order awarding benefits is reversed.

SO ORDERED.

s/ James F. Brown
JAMES F. BROWN
Administrative Appeals Judge

s/ Nancy S. Dolder
NANCY S. DOLDER
Administrative Appeals Judge

s/ David A. Clarke, Jr.
DAVID A. CLARKE, Jr.
Administrative Law Judge

Dated this 29th day of July 1986

APPENDIX C

U.S. Department of Labor

Office of Administrative Law Judges

In the Matter of

HUBERT C. TAYLOR, Claimant
v.
PEABODY COAL COMPANY, Employer
and
OLD REPUBLIC INSURANCE COMPANY, Carrier
and
DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, Party-in-Interest

Date Issued: Aug. 29, 1985
Case No. 82-BLA-3822
OWCP No. CO. 310-10-4934 LM

APPEARANCES: [1]

JACK N. VANSTONE, Esq.
For the Claimant

JACQUELINE A. SIMMONS, Esq.
For the Employer/Carrier

BEFORE: ROBERT L. HILLYARD
Administrative Law Judge

DECISION AND ORDER - AWARD OF BENEFITS

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[1] The Director, Office of Workers' Compensation Programs, was not represented by counsel at the hearing.

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. Section 901 *et seq.* In accordance with the Act, and the Regulations issued thereunder, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs, for a formal hearing.

Benefits under the Act are awardable to persons who are totally disabled within the meaning of the Act due to pneumoconiosis or to the survivors of persons who were totally disabled at the time of their death or whose death was caused by pneumoconiosis. Pneumoconiosis is a dust disease of the lungs arising from coal mine employment and is commonly known as black lung.

A formal hearing in this case was held in Evansville, Indiana, on December 4, 1984. Each of the parties was afforded full opportunity to present evidence and argument at the hearing as provided in the Act and Regulations issued thereunder which are found in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that title.

The findings and conclusions which follow are based upon my observation of the appearance and the demeanor of the witnesses who testified at the hearing, and upon a careful analysis of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent case law.

I. STATEMENT OF THE CASE

The Claimant, Hubert C. Taylor, on June 6, 1977, filed a claim for benefits under the Federal Coal Mine Health and

Safety Act of 1969, as ammended (DX 1).[2] His claim was approved by the Office of Workers' Compensation Programs on March 31, 1980 (DX 15). Peabody Coal Company was identified as the responsible operator and filed its notice of controversion on April 8, 1980 (DX 13 - 16). A formal hearing was requested and the case was referred to the Office of Administrative Law Judges on December 18, 1981 (DX 23).

II ISSUES

The specific issues presented for resolution are:

1. Whether the miner has pneumoconiosis as defined by the Act and the regulations;
2. Whether the miner's pneumoconiosis arose out of coal mine employment;
3. Whether the miner is totally disabled; and
4. Whether the miner's disability is due to pneumoconiosis.

An Administrative Law Judge is precluded from ruling on the constitutionality of the Act and regulations he is called upon to interpret. Therefore, this issue will not be addressed (DX 23; Tr. 12).

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[2] "DX" refers to the Director's exhibits, "CX" refers to the Claimant's exhibits, "EX" refers to the Employer's exhibits, and "Tr." refers to the transcript of the hearing.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Claimant's Background

1. The claimant, Hubert C. Taylor, was born on April 8, 1915 and was 69 years of age at the time of the hearing. He has a fifth grade education (DX 1).

2. The Claimant has one dependent for purposes of augmentation of benefits, his wife, Ida Mae Taylor, whom he married on October 4, 1941 (DX 4; Tr. 14).

B. Coal Mine Employment

Length of coal mine employment is not a contested issue in this case. On his application for benefits, the Claimant alleged 42 years of coal mine employment ending in November, 1976 (DX 1). The personnel records of Peabody Coal Company show that the Claimant was employed by Peabody Coal or its predecessor companies from May, 1934, and was still active through March 24, 1976 (DX 3). The last job which the Claimant performed over a substantial period of time was as a ramp operator (Tr. 14). Therefore, I find that the Claimant has established 42 years of coal mine employment ending in 1976.

IV. MEDICAL EVIDENCE

A. X-ray Studies

	Date	Exhibit	Doctor	Reading	Standards
1.	7-9-84	CX2	Baker Bd. Cert. Rad.	1/2 q	Acceptable
2.	7-9-84 (reread)	EX 6	McGraw B reader; Bd. Cert. Rad.	1/0 s	Acceptable
3.	7-9-84 (reread)	EX 8	Bridges B reader; Bd. Cert. Rad.	1/0 s/t	Acceptable
4.	7-9-84 (reread)	EX 8	Renn B reader	No pneumo-coniosis	Acceptable
5.	7-5-84 (reread)	EX 6	McGraw B reader; Bd. Cert. Rad.	1/0 s	Acceptable

6.	7-5-84 (reread)	EX 8	Bridges B reader; Bd. Cert. Rad.	1/0 s/t	Acceptable
7.	7-5-84 (reread)	EX 8	Renn B reader	No pneumoconiosis	Acceptable
8.	12-19-79	DX 10, DX 11	Noveroske Bd. Cert. Rad.	Completely negative	Not noted
9.	12-19-79 (reread)	DX 9	Greene B reader	1/0 t	Acceptable
10.	12-19-79 (reread)	EX 4	McGraw B reader; Bd. Cert. Rad.	1/0 s/s	Acceptable
11.	12-19-79 (reread)	EX 8	Bridges B reader; Bd. Cert. Rad.	1/0 s/t	Acceptable

12.	12-19-79 (reread)	EX 8	Renn B reader	No pneumoconiosis	Acceptable
13.	12-10-79 (reread)	DX 18	Beeler Bd. Cert. Rad.	1/1 s	Not noted
14.	12-15-76	DX 19	Harmon	Normal chest (not read for pneumoconiosis)	Not noted
15.	12-1-76	EX 3	Hendershot	Essentially normal chest	Not noted
16.	9-1-70	DX 19	Cook	Mild aortic arterio-sclerosis; pleural scarring	Not noted

17. 9-6-67	DX 19	Hovda	Normal chest (not read for pneumoconiosis)		Not noted

B. **PULMONARY FUNCTION STUDIES**

Date	Exhibit	Doctor	Height	FEV_1	MVV	Standards
1. 7-5-84	CX 2	Houser	71″	2.49	73.3	Comprehension & cooperation not noted; 3 tracings

Comment: Mild reduction in forced vital capacity with no evidence of airway obstruction; moderate reduction in MVV noted.

Note: Dr. James Vest found this pulmonary function study invalid for accurate interpretation due to suboptimal patient effort (EX 8).

Note: Dr. Peter Tuteur found the force expiratory maneuvers and MVV maneuvers invalid for interpretation of maximum pulmonary function and stated that the absolutely normal FEV_1 and FVC suggested the absence of a significant ventilatory defect (EX 8).

	Date	Exhibit	Doctor	Height	FEV_1	MVV	Standards
2.	12-19-79	DX 6	Ali	71″	1.98	70	Good comprehension & cooperation; 3 tracings

In a validation study, Dr. Long found vents unacceptable because of poor effort, especially on FEV_1 (DX 6).

In a validation study, Dr. J. Vest found vents unacceptable due to sub-optimal patient effort (EX 1).

	Date	Exhibit	Doctor	Height	FEV_1	MVV	Standards
3.	11-29-76	EX 3	Korn	71″	2.67	35	Some difficulty following instructions; no tracings

C. **Blood Gas Studies**

	Date	Exhibit	PCO2	PO2
1.	7-5-84	CX 2	35.0	100.3
2.	12-19-79	DX 6 DX 8	23.1	63.4

Comment: These functions are consistent with a severe restrictive ventilatory defect. There is no evidence of obstruction. Blood gases indicate hypoxemia with hyperventilation.

Note: Dr. Vest doubted the validity of these results due to the low PCO2 and the normal pH (EX 2).

D. **Narrative Medical Evidence**

1. Dr. Syed A. Ali examined the Claimant on December 28, 1979, at which time he reviewed the Claimant's symptons and his occupational (coal mine employment from 1934 to 1977), medical, smoking (one and one-half packs of cigarettes per day for 32 years, stopped on June 14, 1975), and family histories, and performed a physical examination, pulmonary function study, blood gas study and x-ray. He diagnosed (1) Restrictive lung disease without obstructive component; (2) obesity; and (3) Arthritis, left knee, status post op. In his opinion, some of the Claimant's disability could be attributed to obesity and some to arthritis of the left knee, and he stated that exposure to dust in coal mines did not seem to be a major factor. Dr. Ali also stated that the Claimant stopped coughing when he quit smoking on June 14, 1975 (DX 7).

Dr. Ali stated in a deposition taken on January 30, 1985, that he examined the Claimant on December 28, 1979. He reviewed the medical report that he prepared at that time, and stated that he also saw the Claimant six times after the initial examination for his heart and knee problems. Dr. Ali stated that, in his opinion, the Claimant was not severely disabled, but what disability he did have was caused by a combination of factors. Dr. Ali believed that obesity was the major cause of his disability, but also thought that cigarette smoking, 42 years of coal mine employment, and the Claimant's knee condition also contributed to his disability. Dr. Ali also noted that the Claimant suffered from congestive heart failure due to arteriosclerotic heart disease. (EX 7).

2. Dr. David W. Howard testified in a deposition taken on January 11, 1985, that he reviewed the Claimant's hospital records, x-rays, pulmonary function studies, blood

gas studies, the report of Dr. Ali and the telephonic deposition of the Claimant taken on November 22, 1984, concerning his coal mine employment. He stated that he disagreed with Dr. Ali's finding of a restrictive disease and believed that the pulmonary function study of December 19, 1979 showed a moderate obstructive pulmonary impairment rather than a restrictive impairment because a restrictive impairment could not be diagnosed without other studies. Dr. Howard concluded that the Claimant had simple pneumoconiosis, very mild impairment, and stated that his heart disease and obesity could contribute to this impairment. After reviewing the Claimant's description of his job as a ramp operator, Dr. Howard stated that the Claimant could perform this job from a pulmonary standpoint (EX 5).

3. Records from St. Mary's Hospital in Evansville, Indiana, show that the Claimant was admitted on September 9, 1967 and discharged on September 12, 1967 with a final diagnosis of macrofollicular adenoma of thyroid. A subtotal thyroidectomy was performed (DX 19).

Records show that the Claimant was admitted to St. Mary's Hospital on August 31, 1970 and discharged on September 8, 1970 with a final diagnosis of Arteriosclerotic cardiovascular disease, Peripheral arteriosclerosis; Phlebothrombosis, right leg; Pulmonary emphysema (DX 19).

The Claimant was admitted to St. Mary's on December 6, 1976 with severe osteoarthritic change of the left knee for total knee arthroplasty. Dr. Korn reported that several medical problems prompted surgical admission for treatment of organic heart disease with significant right and left sided congestive heart failure. He performed a physical examination and EKG, and stated that a left total

knee arthroplasty was performed by Dr. A. Percinel. He also noted a 54 pack-year smoking history, none in the last year. Dr. Korn diagnosed (1) Destructive arthritis of the left knee; (2) History of syphilis with positive FTA-ABS; (3) Exogenous obesity; (4) Organic heart disease; and (5) Hyperuricemia. A left total knee replacement was performed (DX 19).

4. Dr A. K. Percinel stated in a letter dated November 24, 1980, that he first saw the Claimant on November 17, 1976 and treated him for degenerative arthritis of his left knee. He did not evaluate him for black lung (DX 18).

V. DISCUSSION AND APPLICABLE LAW

Since the Claimant has established more than ten years of coal mine employment, he will be entitled to a rebuttable presumption of total disability due to pneumoconiosis provided one of the four condition in §727.203(a) is met.

Under §727.203(a)(1), the presumption will be invoked by autopsy, biopsy or x-ray evidence establishing the existence of pneumoconiosis. In this case, there is no autopsy or biopsy evidence. The record contains 17 readings of seven separate x-rays. The x-ray of July 9, 1984 was read as positive for pneumoconiosis by Dr. Baker, a board certified radiologist, and by Drs. McGraw and Bridges, who are both B readers and board certified radiologists, and was read as negative for pneumoconiosis by Dr. Renn, also a B reader and board certified radiologist. The x-rays of July 5, 1984 and December 19, 1979 were read as positive for pneumoconiosis by Drs. McGraw, Greene (a B reader), and Bridges, and were read as negative by Dr. Renn. The x-ray of December 19, 1979 was read as negative by a board certified radiologist and the x-ray taken on December 10, 1979 was read as positive

by a board certified radiologist. Two additional x-rays, taken on December 15, 1976 and September 6, 1967, were not read for pneumoconiosis, and the x-rays of December 1, 1976 and September 1, 1970 did not mention pneumoconiosis. I place greater weight on the nine positive x-ray readings because five different board certified radiologists and/or B readers found x-ray evidence of pneumoconiosis, whereas only two radiologists and/or B readers found no evidence of pneumoconiosis. Therefore, the presumption is invoked under §727.203(a)(1).

Under§727.203(a)(2), the presumption will be invoked by ventilatory studies with results equal to or less than the listed table values. In order to invoke the presumption under this section, the study must be both qualifying (equal to or below the table values) and conforming (meeting the requirements of §410.430). In this case, the pulmonary function studies of December 19, 1979 and July 5, 1984 both produced qualifying values. However, Drs. Long and Vest both found the pulmonary function study of December 19, 1979 unacceptable due to suboptimal patient effort. Drs. Vest and Tuteur also found the pulmonary function study of July 5, 1984 invalid due to suboptimal patient effort, and Dr. Houser, the performing physician, did not note the Claimant's cooperation or comprehension. The qualifications of Drs. Vest and Tuteur are included in the record and I find that their opinions are sufficient to discredit the pulmonary function study. Therefore, the presumption is not invoked under §727.203(a)(2).

To invoke under §727.203(a)(3), there must be blood gas studies with results equal to or less than the listed table values. In this case, the blood gas study of December 19, 1979 produced qualifying values, but Dr. Long found that these results were not feasible and probably the result of mechanical or technical error, and Dr. Vest doubted the

validity of this test due to the low pCO2 and the normal pH. Dr Howard stated that these blood gases could be valid, but that he would like to see a repeat test. In addition, the blood gas study of July 5, 1984 produced non-qualifying values and this study is more probative of the Claimant's current condition because it was performed four years later. Therefore, due to the questionable validity of the December 19, 1979 study and the fact that the more recent study of July 5, 1984 did not produce qualifying values, I find that the blood gas studies do not invoke the presumption under §727.203(2)(3).

Under §727.203(a)(4), the presumption will be invoked by other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment establishing the presence of a totally disabling respiratory or pulmonary impairment. In *Meadows v. Westmoreland Coal Company*, 6 BLR 1-773 (1984), the Benefits Review Board held that all medical reports must be weighed before determining whether the presumption should be invoked under §727.203(a)(4). In this case, Dr. Ali examined the Claimant, but did not express an opinion as to the Claimant's disability and Dr. Howard, who reviewed the medical evidence, stated that from a pulmonary standpoint, the Claimant would still be able to perform his usual coal mine job as a ramp operator. Therefore, since there are no medical opinions finding that the presence of a totally disabling respiratory or pulmonary impairment, the presumption is not invoked under §727.203(a)(4).

Once the presumption is invoked, then Claimant will be entitled to benefits unless the presumption is rebutted under §727.203(b). In this case, the presumption is not rebutted under §727.203(b)(1) because the evidence is clear that the miner last worked in 1976 (DX 1; Tr. 14).

To rebut under §727.203(b)(2), the Employer must present evidence that the miner either has no respiratory or pulmonary impairment or that the impairment he does have does not prevent him from performing his usual coal mine work. *Sykes v. Itmann Coal Company*, 2 BLR 1-1089 (1980). In this case, Dr. Howard found a mild impairment, but stated that, from a pulmonary standpoint, the Claimant could perform his usual coal mine employment. Although Dr. Howard did not examine the Claimant, he based his opinion on the Claimant's histories, including a description of the Claimant's coal mine duties, and on the results of objective testing, and his opinion is uncontradicted. *Worthington v. United States Steel Corporation*, 7 BLR 1-522 (1984). Therefore, I find that the Empioyer has established that the Claimant's impairment does not prevent him from performing his usual coal mine employment and the presumption is rebutted under §727.203(b)(2).

Section 727.203(b)(3) provides for rebuttal of the presumption where the evidence establishes that the total disability of the miner did not arise, in whole or in part, out of coal mine employment. *Gibas v. Saginaw Mining Company*, 748 F. 2d 1112, 1120 (6th Cir. 1984); *Carozza v. United Statas Steel Corporation*, 727 F. 2d 74, 78 (3rd Cir. 1984). In this case, Dr. Ali found that the Claimant's coal mine employment contributed to his disability and Dr. Howard found a mild impairment due to his pneumoconiosis. Therefore, the presumption has not been rebutted unded §727.203(b)(3).

Under §727.203(b)(4), the presumption will be rebutted if the evidence establishes that the Claimant does not have pneumoconiosis. In this case, the x-ray evidence establishes the presence of pneumoconiosis. Therefore, the presumption is not rebutted under §727.203(b)(4).

Because the Claimant has not established entitlement to benefits under §727.203, he must establish entitlement under 20 C.F.R. Part 410 to be awarded benefits. My finding that the Claimant has not established a totally disabling pulmonary or respiratory impairment precludes an award of benefits under the permanent criteria of Part 41. *Clay v. Director*, 7 BLR 1-82 (1984). Under §410.490 [3] a miner will be presumed to be totally disabled by pneumoconiosis if the x-ray, biopsy or autopsy evidence establishes pneumoconiosis and it is established that the pneumoconiosis arose out of the miner's coal mine employment. In this case, as discussed under §727.203(a)(1), the x-ray evidence establishes pneumoconiosis. Under §410.416(a), pneumoconiosis will be presumed due to coal mine employment, where, as here, the miner had over ten years of coal mine employment. In addition, neither physician found that the miner's pneumoconiosis did not arise from his coal mine employment. Therefore, I find that the evidence establishes that the miner's pneumoconiosis arose out of his coal mine employment under §410.416(a) and §410.490.

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[3] Section 410.490 appears to preclude the use of this section in a Part C claim. However, the Third and Eighth Circuits have held that this regulation is applicable to all cases adjudicated under 30 U.S.C.§945. *Coughlan v. Director*, 757 F. 2d 966 (8th Cir. 1985); *Halon v. Director*, 713 F. 2d 21 (3rd Cir. 1983). Since this case was pending on March 1, 1978, it is being adjudicated under 30 U.S.C.§945(b)(1). While *Halon* is not binding on cases arising in the Sixth Circuit, I am persuaded by this Decision and a review of the Act that the use of §410.490 is appropriate. In addition, while the Sixth Circuit has not specifically addressed this issue, the court held in *Dickson v. Califano*, 590 F. 2d 616 (6th Cir. 1978), that the Black Lung Benefits Reform Act of 1977 had the effect of making the interim presumption of the 1972 Act fully applicable to claims filed after June 30, 1973.

The §410.490 presumption of total disability due to pneumoconiosis can be rebutted only by evidence establishing that the Claimant is not vocationally disabled. *Haywood v. Secretary of Health and Human Services*, 699 F 2d 277 (6th Cir. 1983). Since no evidence was offered to show that the miner could have returned to his coal mine employment, I find that the §410.490 presumption is unrebutted. Accordingly, I find under §410.490 that the miner was totally disabled by pneumoconiosis and, therefore, he is entitled to benefits.

VI. ENTITLEMENT

The Claimant, Hubert C. Taylor, is entitled to benefits under the Act.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to Claimant is made herein because no application has been received from counsel. A period of thirty (30) days is hereby allowed for Claimant's counsel to submit an application. The application must conform to 20 C.F.R.§§725.365 and 725.366, which set forth the criteria on which the request will be considered. The application must be accompanied with a service sheet showing that service has been made upon all parties, including the Claimant and Solicitor as counsel for the Director. Parties so served have ten (10) days following receipt of any such application within which to file their objections. Counsel is forbidden by law to charge the Claimant any fee in absence of the approval of such application.

VIII. ORDER

The Employer, Peabody Coal Company, is hereby ordered to:

1. Pay to the Claimant all benefits to which he is entitled under the Act, commencing June, 1977, augmented by reason of his dependent wife;

2. Pay to the Claimant all medical benefits to which he may be entitled;

3. Reimburse the Secretary of Labor for any payments the Secretary has made to the Claimant, and to deduct such amounts, as appropriate, from the amount the Employer is ordered to pay under paragraphs 1 and 2 above; and

4. Pay to the Secretary of Labor interest as provided by law from the date upon which any payment would originally have been due if payment had been made from the date set forth above until the date upon which payment is actually made.

s/ Robert L. Hillyard

ROBERT L. HILLYARD
Administrative Law Judge